Agenda Item: 12-30

Presentation of Administrative Law Judge's Recommended Decision, Pamlico-Tar River Foundation, Carolina Coastal Federation, Environmental Defense and Sierra Club v. NC DENR AND PCS Phosphate Company, Inc., 09 EHR 1839

Explanation:

The Director of the Division of Water Quality issued PCS Phosphate Co. 401 Water Quality Certification No. 3711 with conditions in December 2008 and modified it in January 2009. The 401 Certification addressed PCS Phosphate's plan to continue operation of its phosphate mining operation near Aurora, NC. The 401 Certification is required because future mining operations will impact wetlands and streams under a COE 404 permit and riparian buffers and mitigation required by the Tar-Pamlico buffer rules.

Petitioners contested the procedures followed in issuing the 401 Certification and its adequacy to protect and maintain the existing uses and water quality standards.

Petitioners and PCS Phosphate filed cross motions for summary judgment. The ALJ considered the motions and attachments, pleadings, briefs and arguments by the parties.

The Administrative Law Judge entered a Decision granting summary judgment on all claims to the Division of Water Quality and PCS Phosphate and denying summary judgment to Petitioners. The ALJ's decision recommends the EMC grant summary judgment to the Division of Water Quality and PCS Phosphate and deny summary judgment to Petitioners thereby upholding and affirming the issuance of the 401 Water Quality Certification.

Commission Consideration:

Summary Judgment allows a court and, in administrative proceedings, the ALJ and Commission to enter a judgment or decision when it is shown that (1) there are no genuine issues of material fact in the case and (2) that a party is entitled to a decision in its favor as a matter of law.

An issue is material only if its resolution would prevent the party against whom it is resolved from prevailing in the case. The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact - or the need for the ALJ to make findings of fact.

Conversely, the opposing party has the burden of showing the existence of a genuine issue of material fact; it must come

forward with specific facts to controvert the facts set forth in the moving party's forecast of the evidence.

When the material facts are shown not to be in dispute, the ALJ and Commission apply the law to the facts and grant Summary Judgment on all of the issues in the case to the party entitled by law to judgment or a decision in its favor.

The APA provides: for an ALJ decision granting Summary Judgment on all issues in a case, the Agency SHALL make a final decision. If the Agency does not adopt the ALJ's decision, it shall remand the case to the ALJ for hearing, which involves finding facts from the testimony and exhibits presented.